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No. 03-636

IN THE

Supreme Court of the United States

GARRISON S. JOHNSON,

Petitioner,

v.

CALIFORNIA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Is a state's practice of routine racial segregation of state prisoners for at least a 60-day period subject to the same strict scrutiny generally applicable to all other challenges to intentional racial segregation, or is it excused from such scrutiny and subject only to the more relaxed review afforded under *Turner v. Safley*, 482 U.S. 78 (1987)?

2. Does California's practice of routine racial segregation of state prisoners for at least a 60-day period violate the Equal Protection Clause?

LIST OF PARTIES

The parties to this proceeding are petitioner Garrison S. Johnson and respondents the State of California, James H. Gomez, and James Rowland.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 321 F.3d 791 (9th Cir. 2003). Pet. App. 1a-31a. The Ninth Circuit affirmed the July 30, 2001, decision of the United States District Court for the Central District of California, which is unreported. Pet. App. 32a-35a. The Ninth Circuit's opinion denying a petition for rehearing with suggestion for rehearing en banc (with four judges dissenting) is reported at 336 F.3d 1117 (9th Cir. 2003). Pet. App. 36a-50a.

STATEMENT OF JURISDICTION

The court of appeals' judgment was entered on February 25, 2003. J.A. 8a. A timely petition for rehearing with suggestion for rehearing en banc was denied on July 28, 2003. J.A. 9a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Title 42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia,

> subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

The California Department of Corrections ("CDC") automatically segregates by race all prisoners upon their initial assignment to a CDC facility for a 60-day period, and for another 60-day period upon each transfer. Petitioner Garrison Johnson ("Johnson"), an African-American, has been racially segregated in his cell assignments at least five times – once on arrival, and at least four more times upon transfer between CDC facilities.[1] The Ninth Circuit rejected Johnson's claim that this CDC policy has violated his right to equal protection under the Fourteenth Amendment.

In upholding the CDC's racial segregation policy, the Ninth Circuit refused to follow this Court's holding in *Lee v. Washington*, 390 U.S. 333 (1968), that racial segregation in prisons is unlawful, and declined to subject the CDC's policy to strict scrutiny despite this Court's consistent application of such scrutiny to all state actions discriminating on the basis of race. *E.g.*, *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *Richmond*

1. Given that Johnson already has been transferred four times in 17 years, it is highly likely he will be transferred again, and subjected again to the admittedly segregationist policy, in the eight-plus years remaining in his sentence of 25 years to life.

v. J.A. Croson Co., 488 U.S. 469 (1989); *Korematsu v. United States*, 323 U.S. 214 (1944).

Instead, the Ninth Circuit applied a standard articulated in *Turner v. Safley*, 482 U.S. 78 (1987), which evaluated whether certain prison regulations having nothing to do with race were "reasonably related to legitimate penological interests." Pet. App. 12a-13a. Noting that the standard of review in this case is "paramount" – that is, outcome-determinative – the Ninth Circuit nonetheless declined to apply the strict scrutiny previously accorded all governmental racial classifications and then upheld California's race-based assignment policy. Pet. App. 11a-13a.

A. The CDC's Policy of Routine Racial Segregation

For more than 25 years, the CDC has segregated prisoners by race when assigning them to double-cell housing upon their arrival at prison, and again upon transfer to another prison. J.A. 182a-183a, 185a [Deposition of Linda L. Schulteis ("Schulteis Depo.")]; J.A. 197a-198a, 203a [Deposition of Steven Cambra ("Cambra Depo.")]; J.A. 302a-307a [Declaration of S. Cambra ("Cambra Decl."), ¶¶ 8, 10, 12]; J.A. 308a-312a [Declaration of L. Schulteis ("Schulteis Decl."), ¶ 5]. Arriving inmates are immediately classified by the CDC as "black, white, Asian, and other." Pet. App. 3a. Prisoners are placed into cells with other prisoners of their same "ethnic race." J.A. 213a (¶ 18); 249a (¶ 5); Opposition to Petition for Certiorari at 2.

Race is concededly the decisive factor in determining with whom new inmates will be housed. J.A. 182a-183a, 185a, 197a-198a, 203a, 302a-307a (¶¶ 8, 10, 12), 308a-312a (¶ 5). In making cell assignments, the CDC uses a form

(CDC-135) that provides only three pieces of information: Name/Number, Security/Custody Level, and Ethnicity/Race. J.A. 207a. The CDC "use[s] . . . race as *the* predominant factor" to determine double-cell housing assignments in the reception center. Pet. App. 20a (emphasis added); *see also* Pet. App. 3a.

B. Garrison Johnson's Experience of Racial Segregation in CDC Facilities

Johnson has been incarcerated in CDC institutions since 1987 when he was convicted of murder. J.A. 255a-256a. When Johnson first arrived at a CDC institution, CDC personnel told him that he had to be placed in a "black cell." J.A. 174a. The CDC has transferred Johnson at least four times during his tenure in the California prison system. J.A. 80a-82a. Each time, he was placed in a cell with another African-American. J.A. 173a-177a. In his more than 15 years of observing CDC practices, Johnson has noted that every arriving prisoner has been placed in a cell with a prisoner of the same race. J.A. 178a.

C. Garrison Johnson's Equal Protection Claims and the First Appeal Addressing His Complaint

Having suffered the humiliation of forced racial segregation multiple times, Johnson filed a complaint in federal district court on February 24, 1995, in *pro per*, alleging that the CDC's policy violated his right to equal protection under the Fourteenth Amendment. J.A. 15a. Nearly three years later, on January 8, 1998, the United States District Court for the Central District of California dismissed

Johnson's Third Amended Complaint without leave to amend. J.A. 26a.

On March 21, 2000, the United States Court of Appeals for the Ninth Circuit reversed in part and remanded, holding that Johnson's allegations were sufficient to state a claim for racial discrimination in violation of the Fourteenth Amendment. *Johnson v. California*, 207 F.3d 650, 655 (9th Cir. 2000). J.A. 158a-168a.

D. The District Court Proceedings

On remand, the district court appointed counsel for Johnson and granted leave to file a Fourth Amended Complaint, in which Johnson sought monetary damages and injunctive relief. J.A. 28a-29a; 45a-55a. Discovery was conducted, and all parties sought summary judgment on the equal protection claims. J.A. 130a-277a.

In moving for summary judgment, the CDC contended that security concerns related to *possible* violence among inmates have necessitated its 25-year segregationist policy. J.A. 302a-312a [Schulteis Decl. ¶¶ 5, 10, 11; Cambra Decl. ¶¶ 13-14]. In support of its policy, however, the CDC offered no evidence, because it had none, of violence, security breaches, or disorder resulting from integration of two-person cells. Instead, the CDC stated a belief that "race is very important to inmates and . . . plays a significant role in antisocial behavior" (J.A. 302a-307a [Cambra Decl. ¶ 9]), but offered no data, surveys, academic literature, or other evidence demonstrating that its belief justifies racial segregation. Rather, the CDC relied on subjective fears of racial violence and generalized accounts of conflicts at Pelican Bay, a unique facility housing notoriously violent

convicts, where Johnson has never resided.[2] The CDC made no attempt in any of their summary judgment papers to establish a connection between housing assignments and the outbreak of violence.[3]

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2. The Security Housing Unit of Pelican Bay, commonly referred to as the "SHU,"

> has gained a well-deserved reputation as a place which, by design, imposes conditions far harsher than those anywhere else in the California prison system. . . . [A]ssignment to the SHU is not based on the inmate's underlying offense; rather, SHU cells are reserved for those inmates in the California prison system who become affiliated with a prison gang or commit serious disciplinary infractions once in prison. They represent . . . "the worst of the worst."

Madrid v. Gomez, 889 F. Supp. 1146, 1155 (N.D. Cal. 1995). The CDC admits that the Pelican Bay facility was specifically designed to house notoriously violent male convicts. [Cambra Depo., 17:17-19, attached as Exhibit 1 to Defendants' Response to Plaintiff's "Statement of Uncontroverted Fact [sic] and Conclusions of Law" ("[A]t Pelican Bay, we have some of the most violent men in the – in the California prison system. . . .").]

3. Nor did the CDC address the potential that integrated housing assignments of incoming prisoners might even help to avoid the outbreak of racial violence. *See* Larry Meachum, *Prisons: Breeding Grounds for Hate?*, Corrections Today, Dec. 2000, at 130. Corrections officials and hate crimes experts participating in a roundtable in 1999, hosted by the United States Department of Justice Office of Justice Programs and the Corrections Program Office, agreed that in order to prevent prisons from catalyzing racial hatred, "[p]rinciples of acceptance and tolerance should be integrated into existing programs and population management practices;" that prison "administrators must be deliberate about strategies to promote diversity in housing . . . ;" and that allowing even natural social self-segregation to occur may unnecessarily allow racial prejudice to flourish. *Id.* at 131-32.

The testimony of the CDC's own prison officials demonstrated that the CDC segregation policy rests on anecdotally-based assumptions that inmates of one race will always tend to be violent toward inmates of other races rather than any quantitative data or other specific information. The entirety of the evidence relied upon by the CDC consisted of: (a) four declarations, totaling 28 pages, describing and attempting to justify the CDC's segregated housing policy;[4] (b) short excerpts from the depositions of two of the declarants providing similar opinion testimony (J.A. 313a-316a; Cambra Depo. excerpts attached as Exhibit 1 to Defendants' Response to Plaintiff's "Statement of Uncontroverted Fact [sic] and Conclusions of Law"); and (c) 14 pages of testimony from Johnson's deposition (J.A. 211a, 216a-217a). The CDC presented no empirical studies, no guidelines or regulations from the Federal Bureau of Prisons or any correctional association, no expert testimony, and no policies or practices from any other state that

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4. The CDC provided declarations from Steven Cambra, at the time the Acting Director of the CDC ("Cambra") (J.A. 302a-307a), and Linda Schulteis, the Associate Warden of California State Prison – Lancaster ("Schulteis") (J.A. 308a-312a). As Acting Director of the CDC, Cambra oversaw all of the California prisons and was familiar with the CDC's policies regarding housing decisions. J.A. 302a-303a. Schulteis, who at the time of her deposition had been employed with the CDC for 24 years, testified on behalf of CDC as the person most knowledgeable at the Lancaster facility (where Johnson resided at the time) regarding cell housing assignment policies and procedures. J.A. 181a-195a. A third declaration was supplied by Barry O'Neill, at the time the Associate Warden at Pelican Bay State Prison. J.A. 296a-301a. The fourth declaration was submitted by counsel of record for the CDC, Deputy Attorney General Sara Turner, to introduce and authenticate certain documents. J.A. 253a-254a.

demonstrate racial segregation of newly arriving prisoners for two months is necessary or even helpful in averting prison violence.[5]

The support the CDC offered to justify its policy was conclusory and merely anecdotal, relying on "feelings" and "beliefs":

> [A]s to the initial housing assignment, if we were not to consider race and gang affiliation in the initial double-cell housing decision, I am certain that there will be conflicts both in the cells and the conflict will flow onto the yards. . . . [I]f we were to disregard the initial housing placement being done [by housing an inmate with another inmate of his same ethnic race], then I am certain there would be serious violence among inmates.

J.A. 308a-312a (Schulteis Decl. ¶¶ 10, 11). As Cambra

5. The few studies that do exist have demonstrated that the rate of violence among inmates segregated by race in double cells *surpasses* the rate of violence among inmates who are racially integrated. *See, e.g.*, Chad Trulson & James W. Marquart, *The Caged Melting Pot: Toward an Understanding of the Consequences of Desegregation in Prisons*, 36 Law Soc'y Rev. 743, 769 (2002) (study of the Texas prison system in the aftermath of federal court intervention requiring desegregation of two-man cells, which "found that equal status contact via desegregation did *not* result in more violence compared to violence among inmates who were segregated" and that "the rate of racially motivated assaults among integrated cell partners decreased as integration increased") (emphasis added); Martha L. Henderson, et al., *Race, Rights, and Order in Prison: A National Survey of Wardens on the Racial Integration of Prison Cells*, 80 The Prison Journal 295, 304 (2000). *See* discussion *infra* p. 36.

similarly stated in his declaration:

> If race were to be disregarded entirely, . . . I am certain, based upon my experience with CDC prisoners, that there will be problems within the individual cells. These will be problems that the staff will have a difficult time in controlling. *I believe* there will be fights in the cells and the problems will emanate onto the prison yards. With respect to inside individual cells, *I do not feel* that prison housing staff are adequately able to deal with the problems that *could* arise. . . . Because of the problems we have on the yards, which are open and easily observable areas, with respect to racial conflicts including riots, which have led to serious injury and deaths, *I believe* that the same problems *could* and will surface inside of the individual cells.

J.A. 302a-307a (Cambra Decl. ¶¶ 13-14) (emphasis added). Among other obvious deficiencies, the declarations did not even attempt to justify the application of the segregationist policy to prisoners more than once, *i.e.*, when they have already been observed by CDC personnel for an initial 60-day period and are later moved from one institution to another.

On June 11, 2001, the district court denied the summary judgment motions. J.A. 420a-425a. After this Court decided *Saucier v. Katz*, 533 U.S. 194 (2001), however, respondents Rowland and Gomez successfully moved for reconsideration of the denial of their motion for summary judgment based on qualified immunity. Pet. App. 7a. Johnson appealed. J.A. 40a.

E. The Ninth Circuit's Decision

The Ninth Circuit Court of Appeals affirmed the district court on different grounds, holding that the CDC's automatic racial segregation policy is entitled to a *presumption* of constitutionality and that Johnson had not rebutted that presumption. Pet. App. 31a.

The panel concluded that the standard of scrutiny would be determinative, perceiving that the justification proffered by California was far too slim to prevail if the policy were subjected to strict scrutiny. Pet. App. 11a. Notwithstanding *Lee v. Washington*, 390 U.S. 333 (1968), and the Supreme Court's repeated holdings that *all* state racial classifications are presumptively unlawful and may be upheld, if at all, *only* if able to withstand strict scrutiny, the Ninth Circuit carved out a wholesale "prison exception." It held that the more relaxed review of *Turner v. Safley*, 482 U.S. 78 (1987), should be applied to any intentional racial segregation undertaken by prison administrators. The court upheld California's policy on that relaxed review, concluding that Johnson had not met his burden of refuting a "common-sense connection" between the government's objective and the CDC's racial segregation policy. Pet. App. 19a, 21a. According to the Ninth Circuit panel, in order to prevail, Johnson would have to offer evidence showing that, in the absence of the CDC's racial segregation policy, racial violence would *not* increase. *Id.*

F. The Ninth Circuit's Denial of Rehearing and the Dissent

Johnson petitioned unsuccessfully for rehearing with a suggestion for rehearing en banc. Pet. App. 36a-37a. Four judges dissented from the denial of rehearing. Pet. App. 38a-50a. The dissenting judges argued that this Court has not overruled *Lee*, and distinguished *Turner* because it was not a case involving racial segregation:

> "[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision."

Pet. App. 41a n.1 (quoting *Cohens v. Virginia*, 19 U.S. 264, 399 (1821)). The dissent also noted that "[b]oth the Fifth and Seventh Circuits have refused to accord such extreme deference [to racial segregation by prison administrators], recognizing that, in the context of race, more must be required." Pet. App. 44a. The dissenting judges found *Lee* controlling, especially in light of this Court's recent and repeated command that lower courts apply strict scrutiny to *all* race-based classifications. Pet. App. 38a-42a, 50a.

SUMMARY OF THE ARGUMENT

Thirty-six years ago, this Court held in *Lee* that racial segregation which is constitutionally prohibited outside of prisons is equally prohibited inside prison walls. The Court's opinion affirmed, and found "unexceptionable," the decision of a three-judge court that rejected an argument essentially indistinguishable from that advanced by California here, namely that "the practice of racial segregation in penal facilities is a matter of routine prison security and discipline." *Lee* requires application of strict scrutiny and the reversal of the Ninth Circuit's judgment that California's routine

segregation of prisoners by race and ethnicity is not subject to strict scrutiny and does not violate the Equal Protection Clause.

This Court has repeatedly held, and repeated unanimously just last year, that *every* governmental use of race to classify individuals or assign them benefits or burdens is subject to strict scrutiny and is permissible only if the government proves its use of race necessary and narrowly tailored to advance compelling governmental objectives. California's policy, by which all initial cell assignments – on arrival and on every subsequent transfer – are determined by race or ethnicity, is subject to that rule. This is so regardless of the professed motivation (protection of inmates against violence) that underlies the policy.

The Ninth Circuit erred in disregarding *Lee* and concluding that it was overruled *sub silentio* by *Turner*. The holdings that all governmental segregation and racial classification is permissible, if at all, only upon strict scrutiny, are more recent, more carefully considered, more relevant (reached as they were in cases involving racial discrimination), and more fundamental than the dicta cited from *Turner* and its progeny. The *Turner* standard was not formulated in a case involving intentional racial discrimination, and has never been applied by this Court in any case involving racial discrimination. The same reasons that have led the Court to apply Eighth Amendment review (rather than *Turner* review) to claims alleging violation of Eighth Amendment rights also require application of Fourteenth Amendment strict scrutiny to the intentional racial segregation of prisoners. Further, the policy reasons that underlie *Turner* – the need to preserve for prison administrators a full range of discretion to operate prisons

in the interests of community and prisoner safety – do not extend to cases challenging routine racial segregation, because prison administrators do not need, and are ordinarily not supposed to have, the discretion to engage in racial segregation. To put it another way, under the Fourteenth Amendment, racial discrimination generally, and racial segregation in particular, are not "tools" that prison administrators should routinely use to protect prisoners and the public. *Point I.*

Under the strict scrutiny required by *Lee* and all other cases examining government racial classifications from *Brown v. Board of Education*, 347 U.S. 483 (1954), to *Grutter v. Bollinger*, 539 U.S. 306 (2003), the CDC's routine, automatic, and unexamined segregation policy is invalid.

Assuming *arguendo* that routine racial segregation ever could be justified for long-term prison management – as distinct from its imposition in connection with some specific event such as a post-race-riot emergency – respondents utterly failed to provide the kind of proof necessary to survive strict scrutiny. The CDC pointed to no particularized circumstances requiring the permanent enshrinement of its racial segregation policy; adduced no empirical data or statistical analyses to support the notion that housing together members of different races will always and necessarily lead to violence; and presented no expert testimony or other evidence establishing that its policy was necessary and narrowly tailored to advance compelling state interests. The policy has continued through bureaucratic inertia for twenty-five years without ever being given a hard look. The CDC rested its justification exclusively on anecdotal beliefs and the "feelings" of a handful of administrators, which lack any support and have never been tested or subjected to careful review.

The justification it advanced was no more specific or sound than the justifications advanced in this Court, always unsuccessfully, for numerous "Jim Crow" laws, including those restricting integration in housing, on buses, on golf courses, in restaurants, and in courtrooms. The state's reliance on race or ethnicity categorically, rather than as part of an individualized assessment of each inmate's particular history of racial animosity and pattern of racial violence, violates the Equal Protection Clause. *Compare Grutter*, 539 U.S. 306, *with Gratz*, 539 U.S. 244. *Point IIA*.

The CDC's policy would be invalid even if the more relaxed standard of *Turner* applied. The policy rests on premises (that inmates of different backgrounds will tend to be violent with one another, and that segregated cells will tend to reduce prison violence) that lack any rational support; it causes precisely the full harm that the Equal Protection Clause was intended to eliminate; it is not justifiable as conserving scarce administrative or economic resources; and there are ready alternatives that fully accommodate the state's interests while affording inmates the equal protection and elimination of state-imposed segregation that the Constitution guarantees. Prison officials do not need discretion to routinely segregate prisoners by race and ethnicity. They are required to run prisons, while protecting the public and inmates alike, by means other than routine racial segregation. *Point IIB*.

ARGUMENT

I. RACE-BASED PRISON CELL ASSIGNMENTS, LIKE ALL OTHER RACE-BASED GOVERNMENT CLASSIFICATIONS, ARE SUBJECT TO STRICT SCRUTINY

A. This Court Has Repeatedly Held That All Government Race-Based Classifications Are Invalid Unless They Survive the Court's Most Rigid Scrutiny

Over the last 60 years, this Court has consistently held that government racial classifications must be strictly scrutinized to determine whether such classifications are permissible under the Fourteenth Amendment. The Ninth Circuit's refusal to apply that settled rule, and decision to apply instead the more relaxed standard provided in *Turner*, is grave error, mandating reversal.

The Court recently reaffirmed its deeply rooted holding that "*all* racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.'" *Grutter*, 539 U.S. at 326; *Gratz*, 539 U.S. at 270 ("It is by now well established that '*all* racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized.'") (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995)) (emphasis added). Although the Court split over the constitutionality of the admissions policies at issue, *all nine Justices were in agreement that strict scrutiny applies whenever the government classifies based on race*. *Grutter*, 539 U.S. at 326 (O'Connor, J., for the Court, joined by Stevens, Souter, Ginsburg, and Breyer, JJ.) ("We apply strict scrutiny to all racial classifications. . . ."); *id.* at 378

(Rehnquist, C.J., dissenting, joined by Scalia, J., Kennedy, J., and Thomas, J.) ("[I]n the limited circumstance when drawing racial distinctions is permissible, the government must ensure that its means are narrowly tailored to achieve a compelling state interest.") (citation and internal quotation omitted); *id.* at 388 (Kennedy, J., dissenting) (relying on the Court's repeated reaffirmation of "the absolute necessity of strict scrutiny when the state uses race as an operative category").

The unanimous holding last year in *Grutter* by every current member of this Court that *every* governmental intentional classification on the basis of race be justified, if at all, on a showing by the government that the practice is necessary and narrowly tailored to serve compelling governmental ends, was not novel. It reflected the Court's longstanding understanding of constitutional imperative. Enforcement of the equal protection guarantees requires strict scrutiny for *all* rules classifying by race, and this has been the Court's view for decades prior to *Grutter* and *Gratz*. *See Adarand*, 515 U.S. 200; *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Loving v. Virginia*, 388 U.S. 1 (1967); *Korematsu v. United States*, 323 U.S. 214 (1944). The Court has consistently held that strict scrutiny is required for governmental racial classification "regardless of the government's purported reason for using race and regardless of the setting in which race was being used." *Grutter*, 539 U.S. at 379 (Rehnquist, C.J., dissenting, joined by Scalia, Kennedy, and Thomas, JJ.).[6]

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6 . It was uncertain, for a time, whether that same rule applied to remedial classifications – those intended to remedy the effects of prior state segregation. *See, e.g., Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); (Cont'd)

The unwavering application of strict scrutiny to governmental racial or ethnic classifications derives from the Fourteenth Amendment's history and core purposes. Shortly after it recognized in *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943), that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality," the Court first decided that the Equal Protection Clause demands that racial classifications be subjected to "the most rigid scrutiny." *Korematsu*, 323 U.S. at 216. The Court held that if racial classifications are to be sustained, they must be shown to be necessary to the accomplishment of a compelling or overriding state objective. *Id.* at 216; *see also Adarand*, 515 U.S. at 223-24 ("[A]ll racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized," and "*any* preference based on racial or ethnic criteria must necessarily receive the most searching examination.") (emphasis added, citations omitted).

Strict scrutiny is no less required in the face of odious government racial distinctions made among prisoners. As Justice Scalia has written:

> The benign purpose of compensating for social disadvantages, whether they have been acquired by reason of prior discrimination or otherwise, can no more be pursued by the illegitimate means of racial discrimination than can other assertedly

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(Cont'd)
Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). More recent decisions of this Court dispelled that uncertainty. *See Adarand*, 515 U.S. 200; *Grutter*, 539 U.S. 306.

> benign purposes we have repeatedly rejected. *See, e. g., Lee v. Washington*, 390 U.S. 333 (1968) (*per curiam*) (permanent racial segregation of all prison inmates, presumably to reduce possibility of racial conflict).

Croson, 488 U.S. at 520 (Scalia, J., concurring in judgment) (citations omitted).

Strict scrutiny applies to review all claims challenging intentional governmental racial discrimination for three reasons. First, only a narrow tailoring requirement can "ensure that 'the means chosen "fit" . . . the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.'" *Grutter*, 539 U.S. at 331 (quoting *Croson*, 488 U.S. at 493 (plurality opinion)) (alteration in original). This first rationale serves a "core purpose of the Fourteenth Amendment," that is "to do away with all governmentally imposed discrimination based on race." *Grutter*, 539 U.S. at 341 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)).

Second, racial classifications threaten to cause stigmatic harm, to promote notions of racial inferiority, and to *incite* racial hostility. *Croson*, 488 U.S. at 494 (plurality opinion). Never has the Court accepted the contention that the government can constitutionally resort to racial segregation or classification to quell racial hostility. "The Constitution cannot control [individual] prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore*, 466 U.S. at 433; *see also Buchanan v. Warley*, 245 U.S. 60, 81 (1917) ("It is urged that this proposed segregation will promote the public peace by preventing race

conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution."). Race-based government classification is presumptively unlawful and invariably subject to strict scrutiny even if applied equally. *Loving*, 388 U.S. at 9; *Brown*, 347 U.S. 483.

> The suggestion that racial classifications may survive when visited upon all persons is no more authoritative today than the case which advanced the theorem, *Plessy v. Ferguson*, 163 U.S. 537 (1896). This idea has no place in our modern equal protection jurisprudence. It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal decree.

Powers v. Ohio, 499 U.S. 400, 410 (1991) (parallel citations omitted).

Third, the bloody history that resulted in the Fourteenth Amendment's goal of a colorblind society demands a higher threshold of proof for *any* governmental racial classification. The forced separation of citizens based on race is odious to this equal protection principle.

> [T]he Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.

Grutter, 539 U.S. at 353 (Thomas, J., dissenting). *See also Croson*, 488 U.S. at 518 ("The moral imperative of racial neutrality is the driving force of the Equal Protection Clause.") (Kennedy, J., concurring); *id.* at 520 (Scalia, J., concurring in judgment). To permit review of any racial classification without strict scrutiny would "reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred." *Adarand*, 515 U.S. at 239 (Scalia, J., concurring).

For these reasons, a "racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." *Shaw v. Reno*, 509 U.S. 630, 643-44 (1993) (citation and internal quotation omitted) (applying strict scrutiny to racial gerrymanders).

B. *Lee v. Washington* Demands That Courts Strictly Scrutinize Prison-Based Racial Equal Protection Claims

The appropriate standard of review here is mandated not only by the repeated holdings in *Grutter* and its predecessors, but also by the specific holding in *Lee*, where the Court affirmed that racial segregation of prison inmates violates the Fourteenth Amendment and is presumed invalid unless it survives strict scrutiny. 390 U.S. 333. "[R]acial segregation, which is unconstitutional outside prisons, is unconstitutional within prisons, save for 'the *necessities* of prison security and discipline.'" *Cruz v. Beto*, 405 U.S. 319, 321 (1972) (citing *Lee*, 390 U.S. at 334) (emphasis added).

Like many of the decisions applying *Brown's* invalidation of separate but equal, the Court's decision in *Lee* was a

short *per curiam* opinion, recognizing the simple proposition that state statutes imposing racial segregation in prisons violate the Fourteenth Amendment.[7] Affirming the desegregation decree of the court below, the Court found it "unexceptionable." 390 U.S. at 334. The argument advanced by Alabama to justify its policies which the lower court categorically rejected was, as described, virtually identical to the argument modeled on *Turner* made by California here (and accepted by the Ninth Circuit): "The only defense offered to the contention that the statutes involved herein . . . violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States is that the practice of racial segregation in penal facilities is a matter of routine prison security and discipline." *Washington v. Lee*, 263 F. Supp. 327, 331 (M.D. Ala. 1968) (three-judge court). The judgment affirmed by the Supreme Court rejected an attempt to subject governmental racial discrimination in prisons to lesser scrutiny than is applied to such discrimination elsewhere, noting that "the case was governed by *Brown v. Board of Education*, 347 U.S. 483 (1954), and the numerous cases implementing that decision, [which made] unmistakably clear that racial discrimination by

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7. *See, e.g., Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (public beaches and bathhouses); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (municipal golf courses); *Gayle v. Browder*, 352 U.S. 903 (1956) (public transportation); *Muir v. Louisville Park Theatrical Ass'n*, 347 U.S. 971 (1954) (parks); *New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54 (1958) (parks); *State Athletic Comm'n v. Dorsey*, 359 U.S. 533 (1959) (athletic contests); *Turner v. City of Memphis*, 369 U.S. 350 (1962) (airport restaurants); *Johnson v. Virginia*, 373 U.S. 61 (1963) (courtroom seating); *Schiro v. Bynum*, 375 U.S. 395 (1964) (municipal auditoriums).

governmental authorities in the use of public facilities cannot be tolerated." *Washington v. Lee*, 263 F. Supp. at 331. The three-judge court added that it could

> conceive of no consideration of prison security or discipline which will sustain the constitutionality of state statutes that on their face require complete and permanent segregation of the races in all the Alabama penal facilities. We recognize that there is merit in the contention that in some isolated instances prison security and discipline necessitates segregation of the races for a limited period. However, recognition of such instances does nothing to bolster the statutes or the general practice that requires or permits prison or jail officials to separate the races arbitrarily. Such statutes and practices must be declared unconstitutional in light of the clear principles controlling.

Id. at 331-32.

The references to *Lee*, 390 U.S. 333, in subsequent opinions suggest without exception that it remains very good law, and do not suggest any overruling of its holding that strict scrutiny, rather than any special exception to it for prisons generally, is the constitutionally mandated standard that must be applied to all prison racial classifications. For example, in *Hudson v. Palmer*, 468 U.S. 517, 523 (1984), the Court cited and quoted *Lee* for the holding "that invidious racial discrimination is as intolerable within a prison as outside, except as may be essential to 'prison security and discipline.'"

The Court cited *Lee* again in *Turner*, 482 U.S. at 84, as authority for the point that inmates retain constitutional protections in prison, including protection from race discrimination. The Court did not suggest in any way that the application of strict scrutiny to a race-based equal protection claim in *Lee* had been called into question.

Justice Scalia's 1989 concurrence in *Croson* cited *Lee* in the course of recognizing that only "a social emergency" imminently threatening "life and limb" could justify limited racial segregation of inmates. *Croson*, 488 U.S. at 520-21 (Scalia, J., concurring in judgment). Last year, after first explaining that "pressing public necessity" is synonymous with "compelling governmental interest" under the strict scrutiny standard, Justice Thomas cited *Lee* for the holding that prison racial segregation can be justified, if at all, only if it survives strict scrutiny:

> I conclude that only those measures the State must take to provide a bulwark against anarchy, or to prevent violence, will constitute a "pressing public necessity." *Cf. Lee v. Washington*, 390 U. S. 333, 334 (1968) (*per curiam*) (Black, J., concurring) (indicating that protecting prisoners from violence *might* justify *narrowly tailored* racial discrimination) . . . .

Grutter, 539 U.S. at 353 (Thomas, J., concurring in part and dissenting in part) (parallel citations omitted) (emphasis added).

The holding of *Lee*, in common with the holding of post-*Brown* cases generally, is plain: the cell-segregation policy challenged here is presumptively unlawful and may

be upheld, if at all, only if the state has carried its burden of proving that policy necessary and narrowly tailored to advance compelling governmental purposes. *Shaw v. Reno*, 509 U.S. at 643-44; *Lee*, 390 U.S. 333.[8]

C. *Turner v. Safley* Created No Exception to *Lee v. Washington* or the Unitary Standard of Review Mandated by the Court's Other Racial Equal Protection Holdings

In neither *Turner* nor its progeny has this Court departed from its unbroken line of precedents applying strict scrutiny to intentional governmental racial segregation.

1. In *Turner*, the Court considered an inmate class action challenging state prison regulations that restricted

8. Numerous lower courts applying *Lee* both before and after *Turner* have strictly scrutinized prison racial segregation policies and practices, invalidating them unless prison officials provide a compelling and narrowly tailored justification for their racial classifications. *See, e.g., Sockwell v. Phelps*, 20 F. 3d 187 (5th Cir. 1994) (strict scrutiny applied under *Lee* to invalidate Texas prison racial segregation); *Black v. Lane*, 824 F.2d 561 (7th Cir. 1987) (strict scrutiny invoked to reverse summary judgment on prisoner's race discrimination claim); *United States v. Wyandotte County*, 480 F.2d 969 (10th Cir. 1973) (a vague fear of racial violence was insufficient to justify a racial segregation policy); *Blevins v. Brew*, 593 F. Supp. 245 (W.D. Wisc. 1984) (under *Lee*, to justify *even temporary initial racial segregation for one night*, officials must show the practice is necessitated by extreme or exigent circumstances involving racial conflict); *Stewart v. Rhodes*, 473 F. Supp. 1185 (S.D. Ohio 1979) (*vague fear* that integration will result in violence held insufficient to justify segregation); *McClelland v. Sigler*, 327 F. Supp. 829 (D. Neb. 1971) (the argument that integration would endanger internal prison security did not justify racial segregation); *but see, Morrison v. Garraghty*, 239 F.3d 648, 655 (4th Cir. 2001); *White v. Morris*, 832 F. Supp. 1129 (S.D. Ohio 1993).

correspondence between inmates and restricted inmate marriage. 482 U.S. at 81. Before addressing the inmates' specific First Amendment and Fourteenth Amendment due process claims, the Court articulated a standard of review for those claims that would be responsive to two relevant principles. *Id.* at 85. On the one hand, "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Id.* at 84. Because prison inmates remain protected by the Constitution, "federal courts must take cognizance of valid constitutional claims of prison inmates." *Id.* The Court cited *Lee* among other cases in support of the principle that prisoners retain constitutional rights. On the other hand, separation of powers and federalism counsel deference to state prison authorities, who are better equipped than federal courts to deal with the problems of prison administration or reform. Because certain "complex and intractable" problems that bedevil America's prisons are "not readily susceptible of resolution by decree[,]" the "expertise, planning, and the commitment of resources" necessary to run a prison "are peculiarly within the province of the legislative and executive branches of government." *Id.* at 84-85.

Consistent with these principles, the Court formulated a standard of review based on four of the Court's prior prisoners' rights decisions which, like *Turner*, did not involve any claimed violation of the right to racial equal protection.[9] The Court did not cite *Lee* or any cases involving equal protection, race, or any other suspect classifications as a basis

9. *See Turner*, 482 U.S. at 86-87 (citing *Block v. Rutherford*, 468 U.S. 576 (1984); *Bell v. Wolfish*, 441 U.S. 520 (1979); *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119 (1977); and *Pell v. Procuinier*, 417 U.S. 817 (1974)).

for the "reasonably related to legitimate penological interests" standard it adopted. *Turner*, 482 U.S. at 84.[10]

The Court has since applied the *Turner* standard to inmate challenges to prison regulations that arguably impinged on First Amendment rights of free association, free speech, and free exercise, the right to substantive due process under the Fourteenth Amendment, and the constitutional right to access the courts.[11] Moreover, it has written, in dicta, that

10. *Turner* summarizes the standard as follows: "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests [and is not] an 'exaggerated response' to prison concerns." *Turner*, 482 U.S. at 89, 90. *Turner* identifies four factors that should be considered under this standard: (1) whether there is a valid, rational connection between the prison regulation and a neutral, legitimate government interest put forward to justify it; (2) whether alternative means of exercising the asserted constitutional right remain open to the inmate; (3) whether and to what extent accommodation of the asserted right will have an impact on prison personnel, inmates, and the allocation of prison resources; and (4) whether a ready alternative to the challenged practice exists that will fully accommodate the prisoners' interest at *de minimis* cost to valid penological interests. *Id.* at 89-91.

11. *Overton v. Bazetta*, 539 U.S. 126 (2003) (upholding a prison system's limitations on non-contact visits regardless of whether a right to association survived incarceration); *Shaw v. Murphy*, 532 U.S. 223 (2001) (prisoners have no First Amendment right to provide legal assistance to others); *Lewis v. Casey*, 518 U.S. 343 (1996) (lower court failed to accord sufficient deference to prison restrictions on inmates' access to law libraries); *Washington v. Harper*, 494 U.S. 210 (1990) (upholding administration of anti-psychotic drugs to inmates against their will); *Thornburgh v. Abbott*, 490 U.S. 401 (1989) (prison regulations governing what publications inmates (Cont'd)

the *Turner* standard "applies to all circumstances in which the needs of prison administration implicate constitutional rights." *Washington v. Harper*, 494 U.S. 210, 223-24 (1990); *see also Shaw v. Murphy*, 532 U.S. 223, 229 (2001). But the Court has never applied *Turner* in a case involving equal protection of suspect classes, much less held that the more relaxed standard of review applied in *Turner* – rather than the strict scrutiny accorded to racial equal protection claims under *Lee* and the Court's subsequent cases – applies to allegations that prison officials segregate or otherwise classify prisoners by race.

2. Notwithstanding *Lee* and the subsequent repeated holdings (by every member of the present Court, and as recently as June 2003) that *all* governmental racial classifications require strict scrutiny, the Ninth Circuit refused to subject California's policy to that demanding standard. In substituting the relaxed review of *Turner*, it erred, for *Turner* and its progeny[12] neither overturned *Lee* nor created a prison exception to strict scrutiny for governmental racial discrimination. At least five considerations support the conclusion that the rule of *Lee*, *Croson*, and *Grutter* – not *Turner* – governs this case.

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may receive must be reasonably related to legitimate penological interests); *O'Lone v. Shabazz*, 482 U.S. 342 (1987) (a prison regulation that impinges upon inmates' free exercise rights is constitutionally valid if it is reasonably related to legitimate penological interests); *Vester v. Rogers*, 482 U.S. 916 (1987) (denying review of challenge to restriction on prisoner-to-prisoner correspondence with citation to *Turner*).

12. *Shaw v. Murphy*, 532 U.S. 223; *Washington*, 494 U.S. 210; *O'Lone*, 482 U.S. 342.

First, the present case is squarely governed by a specific decision of this Court which has not been overruled. *Lee* was decided under the rule of strict scrutiny applied in *Brown* and its progeny. *Lee* rejected a position advanced by Alabama that would have created a prison exception to the strict scrutiny otherwise governing all intentional governmental racial segregation.[13] But Alabama's archaic position – rejected in *Lee* – would have to be embraced here if *Turner* were applied to governmental action involving racial discrimination. The case is therefore governed by precedent, *see Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854-55, 862-84 (1992), and by the rule that the Court's prior decisions are not subject to overruling by implication. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).[14]

Second, the *Croson-Grutter* rule was formulated in cases involving racial discrimination – the very issue presented here. The reference to *Lee* in both *Croson* and *Grutter* makes plain that racial classifications in prison are included in the class of "all racial classifications" that are subject to strict scrutiny. By contrast, the *Turner* standard was formulated in a case not involving racial discrimination, and has never been applied in a racial classification case by this Court.

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13. In the Brief for Appellants, filed by Alabama with this Court in *Lee*, the state unsuccessfully argued that "[t]he same rules relating to race which have been judicially applied since 1954 to public parks, schools and similar public facilities are not applicable to and should not be applied to prisons and jails." Brief for Appellants at 10, *Lee*, 390 U.S. 333 (No. 75).

14. *Lee* was not a summary affirmance. It was subject to oral argument; thereafter, the Court issued a *per curiam* opinion, and three justices wrote a concurring opinion.

Third, if there is any conflict between the broad, categorical rule stated in *Grutter* and its predecessors (for racial discrimination) and the rule stated in *Turner* and its progeny (for prison regulations), the *Grutter* rule is more fundamental and specifically applicable. Strict scrutiny for all racial classifications is rooted in the history of slavery, the Civil War amendments and the constitutional commitment to achieving a colorblind society. Strict scrutiny of government racial classifications has been repeatedly and carefully considered by this Court; has been reiterated more recently than has the *Turner* rule; and is demonstrably correct as stated. The dicta in *Turner*, and repeated subsequently, suggesting a general application of its holding to prison cases, does not apply to rules segregating prisoners by race or "ethnic race" (the term used by the CDC [Opposition to Petition for Writ of Certiorari at 2]), just as it does not apply to cruel or unusual punishment meted out by prison officers.

That *Turner's* dicta does not trump settled holdings in other areas is shown by the Court's subsequent Eighth Amendment jurisprudence. Claims under the Eighth Amendment that prisoners have been subject to cruel or unusual punishment are subject to the Eighth Amendment's own *sui generis* standard, not the broadly deferential *Turner* rule. *See Nelson v. Campbell*, No. 03-6821, 2004 U.S. Lexis 3680, *14-15 (May 24, 2004) (analyzing prisoner's claim that his constitutional rights were impinged with no reference to *Turner*); *Hudson v. McMillian*, 503 U.S. 1 (1992) (same); *Wilson v. Seiter*, 501 U.S. 294 (1991) (same); *Spain v. Procunier*, 600 F.2d 189, 194 (9th Cir. 1979) (Kennedy, J.) ("The whole point of the amendment is to protect persons convicted of crimes. Eighth amendment protections are not forfeited by one's prior acts. Mechanical deference to the findings of state prison officials in the

context of the eighth amendment would reduce that provision to a nullity in precisely the context where it is most necessary."). Claims involving intentional racial segregation are equally subject to the Equal Protection Clause's controlling standard of review, and deference to the beliefs of the CDC in this context would similarly reduce the protections of the Fourteenth Amendment to a nullity.[15]

Fourth, this Court has expressly rejected the argument that government representatives – whether in the legislative or executive branch of local, state, or federal government – are entitled to judicial deference when racial classifications are involved. *Adarand*, 515 U.S. at 235-36.[16] Even Congress is not entitled to deference that would permit the Court to

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15. When the government brings an enforcement action under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, the question whether the state program discriminates on the basis of race is subject to strict scrutiny. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 290-91 (1978); *see also Gratz*, 539 U.S. at 276 n.23. It is therefore inconceivable that the same question, when examined in the context of a suit brought under the Equal Protection Clause by the victim of such discrimination, would be subject to some more relaxed standard.

16. This argument was also made, and rejected, in *Lee*, wherein the state of Alabama unsuccessfully argued in its reply brief that

> [w]e have in this case an illustration of a legitimate area for the exercise of administrative discretion. It would be wrong, and even dangerous, for this court to upset the time honored, judicially recognized, principle permitting wide administrative discretion in an effort to stop one alleged invidious practice, particularly when you can insure the end of that alleged practice by a simple and clear declaration of the law.

Appellants' Reply Brief at 2, *Lee*, 390 U.S. 333 (No. 75).

use a relaxed standard of scrutiny when reviewing assertedly benign classifications based on race or ethnicity. *Id.* at 223-24, *rev'g*, *Fullilove v. Klutznick*, 448 U.S. 448 (1980). The legislative and executive branches may be generally better equipped than the judiciary to determine how to manage prisons with respect to the vast generality of prison rules or prison administrator conduct, but the judiciary is best suited to evaluate racial protection claims and to scrutinize carefully any claimed necessity to segregate prisoners by race. *Croson*, 488 U.S. at 490-91 (plurality opinion); *see Grutter*, 539 U.S. at 326; *Adarand*, 515 U.S. at 227-30.

Finally, the *Turner* rationale does not reach, and has no logical application to, official, regularized state-sanctioned racial segregation or other discrimination. Rooted as it is in the recognition that prison administration is difficult and within the peculiar province of prison officials (*see Turner*, 482 U.S. at 85), *Turner* neither afforded nor was intended to foster or protect the discretion to treat prisoners differently because of their race or ethnic background. Under the law, prison administrators must first find ways *other than racial classifications* to advance compelling state interests. "[O]nly a social emergency rising to the level of imminent danger to life and limb – for example, a prison race riot, requiring temporary segregation of inmates, *cf. Lee v. Washington*, *supra* – can justify an exception to the principle . . . that our Constitution is colorblind." *Croson*, 488 U.S. at 520-21 (Scalia, J., concurring in judgment) (citation and internal quotation omitted).

Freedom from racial segregation is qualitatively different from the rights to which the Court has applied *Turner*. *See supra* note 11. The right to freedom from racial

segregation implicates not only all the historic concerns inherent in the Court's racial protection jurisprudence, but also the very legitimacy of the penal system, an institution which was "founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). Given the significant societal harms posed by the threat of government-created racial classifications, and the rare and highly unusual circumstances in which segregating prisoners by race might ever be temporarily necessary, strict scrutiny is necessary to determine whether the CDC is using race illegitimately, unnecessarily classifying and segregating prisoners by race when compelling governmental goals can be advanced just as well, and almost certainly far better, by colorblind means.

II. THE CDC'S POLICY OF SEGREGATING ALL ARRIVING INMATES BY RACE AND ETHNICITY VIOLATES THE EQUAL PROTECTION CLAUSE

The CDC presented *no* evidence that its policy of racially segregating two-man cells in *all* CDC facilities for *all* incoming inmates and *all* transferred inmates (regardless of, *inter alia*, the length of their tenure and prior conduct) is necessary to protect against inmate violence. Nor did the CDC present evidence that it had ever questioned, reviewed, or assessed the need for the policy during its 25-plus year history. The CDC offered no testimony or other evidence demonstrating that a mixed-race cell assignment had led to any violence at any CDC institution, at any time, much less that its policy is necessary and narrowly tailored to avert such violence. Nor did the CDC offer any expert testimony to support the notion that its policy of automatic segregation by race minimizes the risk of prison violence. A generalized fear of racial violence is the *only* basis on which the CDC's policy of racial segregation rests.

Whether the policy is subjected to strict scrutiny under *Lee*, or even the more relaxed standard employed in *Turner*, the CDC's automatic, blanket segregation policy does not withstand scrutiny under the Equal Protection Clause.

A. The CDC's Implementation of Racial Segregation Is Not Narrowly Tailored to Serve a Compelling State Interest, or *Any* Interest

Under standards advocated by Justices Scalia and Thomas, it is doubtful that the daily management of the California prison system – as distinct from some particular situation constituting an emergency – presents a sufficiently "compelling necessity" that might merit further analysis under strict scrutiny. *Croson*, 488 U.S. at 521 (Scalia, J., concurring in judgment); *Grutter*, 539 U.S. at 352-53 (Thomas, J., concurring and dissenting). Even if the routine use of racially segregated cell assignments of all arriving prisoners for 60 days so as to minimize inmate violence to other inmates could present a "compelling governmental interest" in justifying routine racial segregation under a strict scrutiny analysis, the CDC entirely fails to meet its burden of showing that its policy is necessary to advance that interest or is narrowly tailored to do so.

The CDC's policy of routinely subjecting arriving inmates to racially segregated cells is the antithesis of *narrowly tailored*. It is an overbroad, blanket approach that has been mechanically applied for more than 25 years, and is applied today in the face of empirical data (*see supra* note 5) suggesting it is the wrong policy to address any need asserted by the CDC. No individualized consideration is given to assess whether the policy is necessary for each newly incarcerated prisoner. No individualized consideration is

given to assess whether segregation is necessary for each transferred prisoner. *Compare Grutter*, 539 U.S. at 333-34, *and Bakke*, 438 U.S. at 315-18 (consideration of race on an individualized basis, together with other factors, held permissible) *with Gratz*, 539 U.S. at 269-76 (holding unconstitutional the mechanical, un-individualized consideration of race).

Nor has the CDC proffered anything but *ipse dixit* to support its contention that such a blanket, arbitrary policy is necessary to prevent violence. The CDC has proffered nothing more than its untested *assumption* that all prisoners will be violent with other prisoners of a different race or national origin. *See supra* pp. 8-9, 13. The entire CDC record comprises the speculation of two CDC witnesses that they (and therefore by extension the CDC) are "*certain*" that "there will be conflicts" and "serious violence among inmates," and that "there will be conflicts both in the cells and the conflict will flow onto the yards," if race "were disregarded entirely." J.A. 308a-312a [Schulteis Decl. ¶¶ 10-11 (emphasis added)]; J.A. 302a-307a [Cambra Decl. ¶¶ 13-14]. Courts uniformly hold the kinds of unquantitative, conclusory assertions offered here insufficient to justify racial classification under strict scrutiny. *See, e.g.*, *Gratz*, 539 U.S. at 269-276; *Adarand*, 515 U.S. at 238; *Croson*, 488 U.S. at 498-506.[17]

17. The CDC's time-worn arguments of racial violence stemming from integration have been made repeatedly by segregationists, in several contexts, over the past century. When the Army began to desegregate its ranks in 1950, there were "general predictions of ruined efficiency, wrecked morale, even bloody revolt . . . ." Lee Nichols, *Breakthrough on the Color Front* 7 (1954). In addition to objections from the enlisted men, Army officials predicted serious trouble based on past experience with serious (Cont'd)

As noted by the four judges dissenting from the Ninth Circuit's denial of rehearing, "[t]he prison official affidavits . . . do not cite one concrete instance or statistical example of racial violence, instead referring only to the unsubstantiated 'beliefs' of prison officials about what they presume will happen." Pet. App. 43a n.3.

Moreover, carefully read, the depositions and declarations proffered by the CDC do not support its policy under the *Turner* factors, for they are curiously phrased to predict harm "if race were to be disregarded entirely." J.A. 302a-307a [Cambra Decl. ¶ 13]. But that is not the issue posed by Johnson's challenge to the CDC's policy. Race is at present the dominant factor; as the Ninth Circuit noted, "the chances of an inmate being assigned a cell mate of another race is '[p]retty close' to zero percent." Pet. App. 3a (alteration in original).[18] Accordingly, the question presented here is not whether race must be disregarded entirely, but whether it is constitutional for the state to effectively ignore or subordinate all other factors in favor of a single-minded

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racial disturbances, and even full-scale race riots. *Id.* at 58-59. The experience of the Army, however, once the desegregation process had actually begun was quite different, according to Nichols: "Detailed official analysis by statements of hundreds of field commanders, showed that racial conflict – once a critical military problem that led to repeated bloody riots, had all but vanished. With Negroes and whites no longer grouped separately, there was apparently little motive for racial 'gang' conflict." *Id.* at 7.

18. *See also* J.A. 183a [Schulteis Depo.] (Q: "Why as a practice do you put a black with a black and a white with a white? A: Or a Hispanic with a Hispanic? Q: Or a Hispanic with a Hispanic? A: My whole career we've done that. My whole entire 24 years with the department. It is what the department has done.").

consideration of race as the predominant factor governing initial 60-day placements. The declarations do not assert that there would be harm in the CDC's prisons if race were no longer the controlling, overwhelmingly dominating factor, only (in conclusory terms) that there would be harm if it were "disregarded entirely." Pet. App. 25a; J.A. 302a-307a [Cambra Decl. ¶ 13].

The few available published studies implicitly condemn the CDC's policy by demonstrating that the rate of violence between inmates segregated by race in double cells *surpasses* the rate of violence among inmates in cells that are racially integrated. *See supra* note 5; *cf.* Martha L. Henderson, et al., *Race, Rights, and Order in Prison: A National Survey of Wardens on the Racial Integration of Prison Cells*, 80 The Prison Journal 295, 304 (2000) (in a 1997 nationwide survey, 88.5% of maximum-security wardens responding were of the opinion that integrated cells have a similar or lesser level of conflict than segregated cells).

The CDC's attempt to justify segregation based on its perception of typical beliefs, gang affiliations, hostilities and prejudices of the inmates falls far short of the kind of showing that could justify the policy on strict scrutiny. The CDC asserts that the reason arriving prisoners must be segregated by race is that "inmates believe race to be an important issue . . . [which] stems from the identification that prisoners, particularly male prisoners, make of themselves . . . [and] from the gang involvement that is a part of many of the inmates' backgrounds and is generally found to play a role in those inmates' anti-social, criminal behavior." J.A. 302a-307a [Cambra Decl. ¶ 9]. But an assertion of that generality does not begin to justify routine 60-day racial segregation of all incoming inmates, regardless of their crimes or the

character of information already available to the CDC about any given inmate; it does not begin to justify the automatic assignment of Johnson, upon each of four transfers after years of observation by CDC personnel, to a racially segregated cell; and it does not explain why cell assignments that are deemed safe on day 61 are presumptively unsafe on day 59 (or day 30, or day 10); or why a prisoner who has been segregated for 2 months already and can therefore safely be celled with those of any "ethnic race" must be re-segregated for another two months merely because the CDC has decided for its own administrative convenience to transfer him to a different CDC institution.

That some inmates may indulge in race-based hatreds and stereotypes does not suggest that the CDC should condone or support such biases as a matter of policy and practice. *See, e.g.*, *Palmore*, 466 U.S. 429 (the state cannot justify removal of a child from its mother's custody based on effects of racial prejudice expected to result from mother's marriage to a man of a different race).

B. Because the CDC's Arbitrary Racial Segregation Is an Exaggerated Response to Unsubstantiated Fears, It Does Not Even Withstand Scrutiny Under *Turner*

Even assuming *arguendo* that *Turner* rather than *Lee* should be applied to the CDC's racial segregation policy, the Court's deference to prison administrators' judgment under that standard is not absolute, and the CDC's showing fails even that lesser scrutiny, properly applied. *Cf. Turner*, 482 U.S. at 100 (Stevens, J. concurring in part and dissenting in part) ("How a court describes its standard of review when a prison regulation infringes fundamental constitutional rights

often has far less consequence for the inmates than the actual showing that the court demands of the State in order to uphold the regulation."); *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) ("[D]eference does not imply abandonment or abdication of judicial review.").

The CDC has failed to satisfy the first, and most important, prong of the *Turner* test – "a regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." *Turner*, 482 U.S. at 89-90. The CDC failed to provide any evidence supporting a valid, logical connection between the CDC's racial segregation policy and the concededly legitimate penological interest of preserving prison security, and the Equal Protection Clause prevents the courts from presuming any such support. The CDC presented *no* documented cases of prison violence stemming from integration of a two-man cell, *no* empirical evidence of increased violence resulting from the integration of cells in other prison systems, and *no* expert testimony tending to support a heightened risk of violence or lack of discipline stemming from such integration. Indeed, as discussed above, the CDC offered nothing more than unsupported conjecture in support of its assertion that integration would lead to increased violence.[19] On the record in the district court

19 Compare *Reed v. Faulkner*, 842 F.2d 960, 963 (7th Cir. 1988) (Posner, J.), in which a rule barring dreadlocks did not survive scrutiny under *Turner*.

> No evidence of . . . a danger [of racial conflict] was presented. . . . One prison administrator testified "that a person who is wearing the symbol of the dreadlock might indeed be wearing something as a symbol" that blacks

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(and here), the CDC's policy is nothing more than an "exaggerated response" to its subjective fears of racial violence. *Turner*, 482 U.S. at 87. Because the CDC's policy cannot satisfy the first and most important *Turner* factor, it should be invalidated "irrespective of whether the other [*Turner*] factors tilt in its favor." *Shaw v. Murphy*, 532 U.S. at 229-30.

The CDC's automatic racial segregation policy fails the remaining *Turner* factors as well. First, the inmates do not have available alternative means to exercise the abridged constitutional right to be free from racial discrimination. The Ninth Circuit's finding that Johnson has a "reasonable alternative" to exercise his right to be free from discrimination because he is not subject to segregation during meals and recreational time and because the practice is temporary (Pet. App. 22a-24a) inaccurately suggests that this Court's jurisprudence permits judicial endorsement of state-sponsored discrimination provided that the discrimination is applied only part-time. The evils of state

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> are superior to whites, and apparently it was this testimony that became transmogrified in the district court's opinion into "a security concern for potential racial conflict from the professed Rastafarian belief that dreadlock symbolizes black superiority." Actually there was no evidence that the dreadlock symbolizes black superiority, as distinct from being a conspicuous outward manifestation of Rastafarianism, a faith that does teach black superiority; however, as such a manifestation it might remind white inmates of the Rastafarian belief in black superiority. Yet this is pure conjecture, and to suppose that the wearing of dreadlocks would lead to racial violence is, on this record, the piling of conjecture upon conjecture.

racial segregation do not dissipate merely because it is doled out only in successive 60-day intervals, or because the inmate is not locked in a segregated cell for 24 hours a day.[20] Not only is the time spent by inmates in dining halls and on the yard inconsequential as compared to the time spent living and sleeping in racially segregated two-man cells, but the whole argument is flawed, and

> [a]kin to asserting that if a school-child only has to go to a segregated school one-third of the year, the requirements of *Brown v. Board of Education* are met. As the District of Columbia Circuit stated in *Pitts v. Thornburgh*, the right to be free from discrimination is the right to be free from a particular, definite, constitutional harm, not the right to engage in a particular activity or associate with particular persons.

Pet. App. 46a [Denial of Rehearing (dissenting opinion)]. *See also Adarand*, 515 U.S. at 229-30 ("[W]henever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection.").

The right to be free of racial discrimination does not lend itself to alternative channels of expression.

20. The Ninth Circuit's perception that the automatic segregation policy lasts for only 60 days is contrary to the record, which demonstrates that the automatic segregation policy is applied again upon transfer of any inmate. Pet. App. 2a, J.A. 302a-307a [Cambra Decl. ¶ 12]. As noted by the panel itself, "[i]f the inmate is transferred, he again goes through the initial housing screening process." Pet. App. 4a-5a.

Racial discrimination either occurs or it does not. *Cf. Harris v. Thigpen*, 941 F. 2d 1495, 1517 (11th Cir. 1991).

> [A]ny privacy right claimed here by the seropositive inmates in their medical status is a "passive" one. It is difficult to talk of "alternative means" of protecting such a right, since, unlike the first amendment context, there is no range or continuum of other affirmative activity against which to measure the encroachment of a given prison restriction. Just as one cannot be "a little bit pregnant," disclosure of one's HIV status either occurs or it does not. Thus, in our case, this particular factor of the *Turner* calculus does little to channel our inquiry into the *reasonableness* of the segregation policy as a restriction on seropositive inmates' right to privacy in disclosing their medical diagnoses.

Id. Because *all* prisoners are subject to the automatic segregation policy – there is *no* alternative – this *Turner* factor also weighs against the CDC policy.

Under *Turner*, the Court would also examine whether the CDC's automatic segregation policy may be justified as necessary to avoid a detrimental impact on prison resources. With respect to this factor, the CDC's entire argument below rested on the premise that initial cell assignments made without regard to race will inevitably lead to increased violence, but the CDC supplied no evidence to support this faulty premise. Other than a mere assertion of inevitable violence, nothing has been offered to support the notion that avoiding race-based criteria will cause more violence or any consequential strain on prison resources, and the experiences

of other jurisdictions suggest otherwise. The CDC produced no evidence to suggest that integration will create a ripple effect endangering staff and other prisoners, or require greater expenditure of scarce resources – and again, the empirical evidence from other prison systems suggests, to the contrary, that the level of violence will decrease with integration. *See* Trulson, *supra* note 5; Henderson, *supra* note 5. This *Turner* factor also condemns the CDC racial segregation policy.

The remaining *Turner* factor examines whether there exist "obvious, easy alternatives" that could achieve the same security purposes as the automatic segregation policy at *de minimis* cost to valid penological interests. *Turner*, 482 U.S. at 90-91. Here, such "obvious, easy alternatives" are plain. First, for all assignments subsequent to the first, the "obvious, easy alternative" is to look at the inmate's file and assign him to housing based on his own demonstrated character and conduct.[21] Second, even for the first assignment, the same alternatives applied by the Federal Bureau of Prisons and other states – looking at the pre-sentence report, or such other information as is made available to the prison system for every arriving inmate, and using any of the remaining tools of prison administration – suffice.

To the extent that the CDC repeatedly professes that its race-based policy is designed to avoid violent encounters between members of rival gangs, and believes that it is important to segregate prison cells by race because of "the gang involvement that is a part of many of the inmates'

21. Even those inmates who have not been incarcerated by the CDC previously will have jail records.

backgrounds" (J.A. 302a-307a [Cambra Decl. ¶ 9]), those goals can easily be achieved by screening inmates on the basis of easily observed signifiers of gang affiliation rather than by the color of their skin. In fact, this goal would be *better* achieved without using race-based criteria at all, given that many rival gang members are members of the same race (and many members of any race are not gang members).[22] In furtherance of its stated goal of maintaining prison security, the CDC could also refer to psychological profiles received when an inmate arrives at, or is transferred to, a CDC facility, indicating racial animus or a history of interracial violence. There is no need to make the unlawful and offensive assumption that all members of a particular race will become violent toward members of other racial groups, but not their own, if housed with inmates of other races. By minimally altering the screening criteria in this fashion away from a strictly race-based test, the same goals can be better achieved.

The Court has previously looked to well-run prison systems in other states, and the Federal Bureau of Prisons, in determining whether obvious, easy alternatives exist that do not unnecessarily impinge on inmates' rights. As noted

22. The CDC's assumption that merely being of the same race is a good proxy for compatibility is belied by the realities of prison gang violence. For example, members of the Aryan Brotherhood target and kill other members of the Aryan Brotherhood for reasons that have nothing to do with race. *See* David Grann, *The Brand: How the Aryan Brotherhood became the most murderous prison gang in America*, The New Yorker, Feb. 16, 2004, at 157. Nor do prison gangs operate along strict racial lines. There are mixed-race prison gangs and alliances between gangs of different races. Alan Elsner, *Gates of Injustice: The Crisis in America's Prisons* 41-42 (2004). For instance, the Aryan Brotherhood has a working relationship with the Mexican Mafia, and the Black Guerilla Family has been known to work with La Nuestra Familia. *Id.*

by the Court in evaluating *Turner*'s restrictions on First Amendment rights, "[o]ther well-run prison systems, including the Federal Bureau of Prisons, have concluded that substantially similar restrictions on inmate correspondence were necessary to protect institutional order and security." *Turner*, 482 U.S. at 93. The Federal Bureau of Prisons Program Statement 1040.04, Policy § 551.90 (1999), states that "Bureau staff shall not discriminate against inmates on the basis of race . . . [t]his includes the making of administrative decisions and providing access to work, *housing*, and programs." (Emphasis added.) Further, as mentioned above, other states that have desegregated two-man cells have found that racially motivated violence has decreased. *See* Trulson, *supra* note 5.

In short, the CDC's policy of racially segregating inmate cell assignments would fail even *Turner* review, were it applicable. The policy rests on premises (that inmates of different races will tend to be violent with one another, and that segregated cells will tend to reduce prison violence) that lack any rational support; it causes precisely the full harm that the Equal Protection Clause was intended to eliminate; it is not justifiable as conserving scarce administrative or economic resources; and there are ready alternatives that fully accommodate penological interests while affording inmates the equal protection and elimination of state-imposed segregation that the Constitution guarantees. State prison officials do not need discretion to routinely segregate prisoners by race and ethnicity. The discrimination tool is not one that prison officials ought to have.

CONCLUSION

For all the foregoing reasons, the judgment below should be reversed, and the case remanded for further proceedings in accordance with the Court's decision.

Respectfully submitted,

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